Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

GEORGE C. S. LIU and GAIL K. LIU,

Petitioners,

v.

KENNETH P. SILVERMAN, ESQ., Chapter 7 Trustee of the Estate of George C. S. Liu and Gail K. Liu,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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3588

QUESTIONS PRESENTED

1. Is an order from a Bankruptcy Judge that approves a settlement which totally ignores the Petitioners' resulting economic hardship and the vivid fraudulent and conspiratorial conduct of attorneys and a real estate broker to be upheld if it violates the Petitioners' due process right to a fair trial?

2. As a case that is of such imperative public importance which has caused the Petitioners to loose all sense of livelihood which was not through their own making, is there a right to justify and reverse the decision from the United States Court of Appeals for the Second Circuit?

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Petitioners, GEORGE C. S. LIU and GAIL K. LIU ("Lius"), respectfully request that a writ of certiorari be issued to review the summary order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is not published in the Federal Reporter (App. A). The summary order of the United States District Court for the Southern District of New York is not published in the Federal Reporter (App. B). The order of the Untied States Bankruptcy Court for the Southern District of New York is not published in the Federal Bankruptcy Reporter (App. C).

STATEMENT OF JURISDICTION

The summary order of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on December 21, 1998. A timely petition for rehearing was denied on January 22, 1999 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Federal Rule of Civil Procedure 60(b)(6) provides:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal

> representative from a final judgment, order or proceeding from the following reasons: . . . . (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The fundamental question in this case is whether a litigant is entitled to relief from an order if the Bankruptcy Court Judge denied the litigant the right to proceed to trial in New York State Supreme Court. It arises in the context of the Lius' motion under Fed. R. Civ. P. 60(b)(6) ("Rule 60(b)(6) Motion") to reopen the order of the Court of Appeals which reaffirms the District Court's order upholding the Bankruptcy Court's order approving, pursuant to Federal Rule of Bankruptcy Procedure 9019, a $1.2 million settlement ($31 million in damages and two lives lost), for the benefit of the Petitioners' estate, of certain of Petitioners' pre-petition legal claims. To fully appreciate the significance of the issues presented in this case, it is important to consider the background of this case.

A. Background

In 1986, the Lius had located a building they wished to purchase that was located at 53-11 90th Street, Elmhurst, New York. They contacted Louis J. Macari, Esq., an attorney who had represented them for more than 18 years, to advise and help them in the purchase of said building. The Lius were told by Louis J. Macari, Esq. to obtain various income and expense information on that house and give it to Louis J. Macari, Esq. The Lius did obtain the information and did give it to Louis J. Macari, Esq.

A few days afterwards, Frank G. Messina, Esq., called the Lius and told the Lius that he was a partner of Louis J. Macari and that they were too busy to handle the purchase

of the building and advised the Lius to contact another attorney — Neil J. Weissman, Esq.

Mr. Weissman told the Lius that the building they were interested in was sold and recommended that they purchase another building called the Blair House which is located at 143-40 Roosevelt Avenue, Flushing, New York 11354. The Lius were told that the Blair House was already converted to a cooperative building. The building was owned by Joseph T. Macari, the brother of attorney Louis J. Macari. The purchase price was $4,750,000.

The Lius told Neil Weissman, Esq., that they did not know how to own or manage a cooperative building and did not have the funds to purchase the Blair House. Mr. Weissman lied and falsely represented the condition, status, and ability of the Lius.

After the closing in November 1986, the Lius learned that the first building they wished to purchase had not been sold and the Blair House was not a cooperative building that had been approved by the New York Attorney General.

The Lius were subsequently burdened with four (4) mortgages that they were unable to pay (three of which were held by Joseph T. Macari).

The Lius further learned that the contract of sale was altered without their knowledge after it was signed by them. The Lius were forced to make more than two million dollars in repairs to the property.

Needless to say, Joseph T. Macari started a foreclosure action. The Lius commenced an action in malpractice in New York State Supreme Court.

During the State Supreme Court action, the Lius discovered that their prior attorneys and Joseph T. Macari had, among other things, forged the mortgage acceptance letter, altered the Contract of Sale, concealed a judicial order, altered the terms of the real property deal, committed fraud, conspiracy, conflict of interest, and destroyed records and files.

In March 1994, the Lius, under the advice of Elliot M. Rudick, Esq., filed a petition for Bankruptcy Protection under Chapter 11. It was converted to Chapter 7 in June 1996.

The Trustee who was appointed in the Chapter 7 case, Kenneth P. Silverman, Esq., decided to continue with the services of Elliot M. Rudick, Esq., the attorney representing the Lius in the New York Supreme Court action.

At a future point in time, just three days before the State Supreme Court trial on April 10, 1997 the trustee recommend that the Supreme Court action be settled with the malpractice carriers for the sum of $1.2 million dollars and with Joseph T. Macari for the sum of $25,000. Mr. Rudick, Esq. agreed with the settlement because he was not prepared to try the case and he would get $400,000 from the settlement.

The action that was brought by Elliot M. Rudick, Esq. on behalf of the Lius in New York State Supreme Court was commenced in March 1992. The nature of the conduct of the attorneys and one of their brothers — Joseph T. Macari (a real estate broker and the mortgagee of the lawsuit) was in conspiracy, fraud, forgery, destroying documents and conflict of interest. Because Mr. Rudick was neither an experienced trial attorney, nor experienced litigator, the case languished in the State Court system for four years before the Lius Chapter 11 Bankruptcy (which was under Mr. Rudick's advice filed) was converted to Chapter 7. Had Mr. Rudick

brought the case to trial prior to the conversion, the Lius rights would have been determined by a jury, the Lius would have an opportunity to win sufficient sums of money to pay their debtors (IRS $45,000 and a second mortgagee of $400,000 which was taken away by Mr. Messina for the subject co-op fee) and to have money to sustain themselves. Instead, the State Supreme Court case was never tried, and by misleading and holding back the truth, Mr. Rudick, together with the Trustee conspired to settle the matter by accepting $1,200,000 from the malpractice insurance carrier for the attorneys (after despoiling the Petitioners all assets of an estimated $32 million), leaving the mastermind of the scam — Joseph T. Macari (the brother of Louis J. Macari) out of the damages who had defrauded the Lius in an extreme way.

After more than five years of litigation, Mr. Rudick was not prepared to try the State Supreme Court case. The Lius had paid Mr. Rudick a $50,000 retainer. Yet, the case was not ready for trial, even though Mr. Rudick had filed a Note of Issue (a form in New York State in which Mr. Rudick stated that all discovery is completed and the case is ready for trial).

At lease three attorneys and one of the attorneys brothers (Louis J. Macari, Frank G. Messina, Neil J. Weissman and Joseph T. Macari) had engaged in a conspiracy to defraud us, they had succeeded. Mr. Rudick and the Trustee had also conspired against us. The nature of the latter conspiracy is as follows: By not bringing the case to trial, Mr. Rudick and the Trustee assured themselves of large fees and also protecting the mastermind of the scam — Joseph T. Macari who is the main beneficiary of the entire fraud. If the case had gone to trial, Mr. Rudick stood the chance of having reduced his $400,000 fee, and the Trustee stood the chance of not receiving huge moneys.

There is no other reasonable explanation for not trying the *State Supreme Court case except that Mr. Rudick* was not competent to proceed and take the "shortcut". When he realized that the Trustee no longer had faith in him, the Trustee and Mr. Rudick agreed to settle the State Supreme Court case. Everyone benefits except the Lius. We have been literally raped by attorney after attorney.

The Lius had put their faith, trust and all evidencing documents into Mr. Rudick's hands. However, he had deceived us just as the attorneys subject to our lawsuit had deceived us.

By letter dated August 18, 1997, Jaspan Schlesinger Silverman & Hoffman LLP, the Chapter 7 Trustee's law firm, wrote to Chief Judge Tina L. Brozman, United States Bankruptcy Judge, Southern District of New York, that it had retained Mr. Rudick as Special Counsel to handle the State Supreme Court action that he informed the Trustee that he was not an experienced trial lawyer . . ." and ". . . the Trustee lacks confidence in Mr. Rudick's . . . ability to prosecute the State Court action to a successful conclusion . . .". It further stated that Mr. Rudick has never addressed the myriad legal issues and problems that plague the State Court action.

Mr. Rudick had repeatedly assured the Lius of his readiness and ability to pursue and try the case. Instead, Mr. Rudick took our $50,000 and retained an additional $400,000 by agreeing to settle the case. The Lius once again were deceived by an attorney. Everyone benefits — the defendants in the State Supreme Court action, Mr. Rudick, the Trustee and his law firm. The Lius walk away with nothing and were made homeless.

B. The Proceedings Below

After several hearings, United States Bankruptcy Judge for the Southern District of New York, Tina Brozman, on September 3, 1997, made a final order granting the Trustee's motion pursuant to Federal Rule of Bankruptcy Procedure 9019 to approve the $1.2 million settlement of the Lius pre-petition legal malpractice action for the benefit of their bankruptcy estate and its creditors.

The Lius appealed Judge Brozman's final order to the United States District Court of the Southern District of New York. United States District Court Judge Sidney H. Stein, on April 9, 1998, issued a final opinion and order affirming the decision of United States Bankruptcy Judge Tina L. Brozman.

The Lius appealed Judge Stein's order to the United States Court of Appeals for the Second Circuit. On December 21, 1998, the United States Court of Appeals for the Second Circuit issued a summary order adjudging and decreeing that the judgment of the District Court be affirmed.

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE IMPORTANCE OF RULE 60(b)(6) AS A MEANS OF EFFECTUATING DUE PROCESS RIGHTS.

The Lius' petition for writ of certiorari should be granted because a matter crucial to the cause of justice in this case, and the opinion below conflicts with this Court's prior rulings on the importance of Rule 60(b)(6) as a vehicle to correct violations of a party's due process rights.

In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), this Court held that Rule 60(b)(6) may be used to reopen and vacate a final judgment. In holding that the use of Rule 60(b)(6) was appropriate, the court weighed "the risk of injustice to the parties . . . the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the publics confidence in the judicial process." *Id.* at 864.

The Lius were the object of massive fraud by attorneys and a brother of one of the attorneys. As a result of such fraud, the Lius are homeless and penniless. The only hope the Lius had to salvage any monies that they were defrauded of and to regain their dignity and self-worth was to proceed to a trial.

The Lius had a constitutional right to have their claims litigated in a fair and neutral forum. Either they were right or wrong. The New York State Supreme Court judge and jury should decide.

An indication of the strengthening of the Lius' case was made evident by the fact that the two malpractice carriers readily agreed to pay $1.2 million to settle the matter. Insurance companies are known to be very tight with their purse-strings. They would not have agreed to settle for $1.2 million unless they strongly believed that their insured would lose. Motions for summary judgments made by Defendants were denied.

Everybody involved with the litigation has won, except the Lius. The Defendant-attorneys do not have to pay any monies out of their pockets, Elliot M. Rudick, Esq. gets $400,000, plus prepaid a $50,000 retainer, the Trustee's lawyers (his own law firm) get their large legal fees paid, the insurance companies have limited their liabilities, and the Courts have removed a case that frees up the Courts' time.

The Lius, the only innocent people in this tragedy get nothing.

What happened to their right to a trial? Doesn't this great country owe its citizens a right to trial?

CONCLUSION

In order to prevent a travesty of justice from continuing, the summary order of the Court of Appeals for the Second Circuit must be overturned. The Lius should be permitted to exercise their due process constitutional rights to have a trial on the merits.

According, the Lius respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 21, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of December, one thousand nine hundred and ninety-eight.

Present: HONORABLE RALPH K. WINTER,
Chief Judge,
HONORABLE DENNIS JACOBS,
HONORABLE ROSEMARY S. POOLER,
Circuit Judges.

In re: GEORGE C. S. LIU and GAIL K. LIU,

Debtors.

No. 98-5027

GEORGE C. S. LIU and GAIL K. LIU,

Debtors-Appellants,

– v. –

Appendix A

KENNETH P. SILVERMAN, Esq., Chapter 7 Trustee of the Estate of George C. S. Liu and Gail K. Liu,

Trustee-Appellee.

* * *

Appeal from the United States District Court for the Southern District of New York (Stein, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

George C.S. Liu and Gail K. Liu appeal from Judge Stein's order affirming the bankruptcy court's order approving, pursuant to Federal Rule of Bankruptcy Procedure 9019, a $1.2 million settlement, for the benefit of appellants' estate, of certain of appellants' pre-petition legal claims. Appellants contend that the settlement significantly undervalues their claims and that the district court abused its discretion in approving it.

Rule 9019 permits the bankruptcy court, upon motion by the trustee, to approve a compromise or settlement. The court should do so where the proposed settlement is "both 'fair and equitable' and in the best interests of the estate." 10 Collier on Bankruptcy ¶ 9019.02 (15th ed. 1998) (Standards Governing Court Approval of a Compromise) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) ("TMT Trailer")). In making this determination, the court

should weigh the costs and benefits of settlement. *See TMT Trailer*, 390 U.S. at 424 (discussing factors to weigh).

We review a bankruptcy court's decision to approve a settlement extremely deferentially. That court's decision "should not be overturned unless its decision is manifestly erroneous and a clear abuse of discretion." *In re Purofied Down Prods. Corp.*, 150 B.R. 519, 522 (S.D.N.Y. 1993) (internal quotation marks omitted); *see also Anaconda-Ericsson, Inc. v. Hessen (In re Teltronics Servs., Inc.)*, 762 F.2d 185, 189 (2d Cir. 1985). Moreover, we need not conduct an independent investigation into the reasonableness of the settlement but must only "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (internal quotation marks omitted).

The bankruptcy court approved the settlement at issue after two hearings in which it heard and considered all objections thereto and required additional explanation and documentation to be provided by the trustee. After considering all the factors, the bankruptcy court concluded that there were significant risks inherent in continuing to litigate the disputed claims and that the settlement was preferable under the circumstances.

The $1.2 million settlement approved by the bankruptcy judge is manifestly within the range of reasonableness. Appellants' own attorney estimated the reasonable value of their claims, if they prevailed, at about $3.5 million. That they would prevail, of course, is anything but certain, as is

the actual amount of damages they could expect in the event that they did prevail. Notably, the trustee and appellants' own attorney testified to the effect that appellants' underlying claims were internally inconsistent, meaning under the circumstances that they might not prevail against both defendants. Against such speculative benefits, the bankruptcy court weighed the value of a sure thing — $1.2 million — as well as the waiver of a cross-claim for $1.8 million filed against appellants and arising out of the same set of events upon which their claims were predicated. In light of the risks inherent in pursuing the underlying claims, the bankruptcy court's decision was well within its discretion. *See* 10 Collier on Bankruptcy at 9019.02 ("Where the evidence on the issue of a compromise is thorough and comprehensive, and the court is familiar with the entire record . . . the court's approval . . . does not constitute an abuse of discretion.").

The thrust of the oral argument was that the financial arrangements do not achieve justice in terms of what the Lius alleges to be misdeeds of their own counsel. If there was misfeasance by counsel — and we are in no position to consider the question — one proper forum is a complaint to the Departmental Disciplinary Committee, which can be contacted at (212) 685-1000.

We therefore affirm.

FOR THE COURT:
CAROLYN CLARK CAMPBELL, Clerk

s/ Lucille Carr — 12/21/98
By: — Date

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 9, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 7450 (SHS)

In re GEORGE C.S. LIU and GAIL K. LIU,

Debtors.

ORDER

SIDNEY H. STEIN, U.S. District Judge.

George C.S. Liu and Gail K. Liu, debtors, have appealed the bankruptcy court's approval of the bankruptcy trustee's settlement of claims by the estate against individuals who allegedly defrauded the debtors. A bankruptcy court's approval of a settlement "should not be overturned unless it is manifestly erroneous and a clear abuse of discretion." *In the Matter of 47-49 Charles Street, Inc.*, 209 B.R. 618, 620 (S.D.N.Y. 1997). The Bankruptcy Judge's approval of the trustee's settlement of the debtors' fraud and legal malpractice claims in state court, for $1.2 million, was not an abuse of discretion. Judge Brozman appropriately canvassed the issues and determined that the settlement does not "fall[] below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983) (citation omitted). Her approval of the settlement is supported by her conclusions regarding the risks of litigating the claims, as set forth on the record on August 19, 1997.

Appendix B

Accordingly, the order of the United States Bankruptcy Court for the Southern District of New York, dated September 3, 1997 (Brozman, U.S.B.J.), is hereby AFFIRMED.

Dated: New York, New York
April 9, 1998

SO ORDERED:

s/ Sidney H. Stein
Sidney H. Stein, U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AT BOWLING GREEN APPROVING STIPULATION OF SETTLEMENT SETTLING THE TRUSTEE'S CLAIMS DATED SEPTEMBER 3, 1997

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300 Garden City Plaza
Garden City, New York 11530
(516) 746-8000
Anthony C. Acampora, Esq. (ACA#0838)
Shalini Vohra, Esq. (SV#1774)

Settlement Date: September 2, 1997
at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
AT BOWLING GREEN

Chapter 7
Case No: 94B-40970 (TLB)

In re:

GEORGE C.S. LIU AND GAIL K. LIU,

Debtors.

ORDER APPROVING STIPULATION OF SETTLEMENT SETTLING THE TRUSTEE'S CLAIMS

Appendix C

Upon the motion (the "Motion") of Kenneth P. Silverman, Esq., the Chapter 7 Trustee (the "Trustee") of the estate of George C. S. Liu and Gail K. Liu (the "Debtors"), by his counsel, Jaspan Schlesinger Silverman & Hoffman LLP, seeking the entry of an order authorizing and approving the stipulation of settlement (the "Stipulation"), annexed hereto as Exhibit "A", settling the Trustee's claims in a state court action entitled "*Kenneth P. Silverman, Esq., as Chapter 7 Trustee of the estate of George C. S. Liu and Gail Kim Liu against Joseph T. Macari, Louis J. Macari, Frank A. Messina, Neil Weissman, Macari Messina & Ingber, a partnership, and Gould & Weissman, a partnership*", pending in the Supreme Court of New York, County of New York, and granting such other, further and different relief as this Court deems just and proper; and hearings having been held before this Court on July 31, 1997 and August 19, 1997 (the "Hearings"); and the Trustee, and his counsel, Jaspan Schlesinger Silverman & Hoffman LLP, having appeared on those days in support of the Motion; and upon the opposition being filed by the Debtors, by Bertram Brown, Esq. and Lawrence Fein, Esq., and upon the opposition being filed by Sivan Holding Co., which was withdrawn at the first hearing; and upon the record made on both days, the transcripts of which are incorporated by reference herein; and after due deliberation and consideration of all the facts and circumstances; and no additional notice being necessary or required, it is hereby

ORDERED, that the Stipulation be, and hereby is, approved in all respects; and, it is further

Appendix C

ORDERED, that the Trustee be, and hereby is, authorized to take such steps, execute such documents and expend such funds as may be reasonably necessary to effectuate this Order.

Dated: New York, New York
Sept. 3, 1997

s/ Tina L. Brozman
Honorable Tina L. Brozman
Chief United States Bankruptcy Judge

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 22, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 22nd day of January one thousand nine hundred and ninety-nine.

Present:

Hon. Ralph K. Winter, Chief Judge,
Hon. Dennis Jacobs,
Hon. Rosemary S. Pooler,
CIRCUIT JUDGES,

Docket No. 98-5027

In Re: Gail K. Liu

A petition for rehearing having been filed herein by Appellants George C.S. Liu and Gail K. Liu,

Appendix D

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
CAROLYN CLARK CAMPBELL,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

Supreme Court, U.S.
FILED
MAY 28 1999
CLERK

(2)

No. 98-1881

IN THE

Supreme Court of the United States

October Term, 1998

In re:
GEORGE C.S. LIU and GAIL K. LIU,

Debtors,

GEORGE C.S. LIU and GAIL K. LIU,

Petitioners,

-against-

KENNETH P. SILVERMAN, ESQ.,
Chapter 7 Trustee of the Estate of
George C.S. Liu and Gail K. Liu,

Respondent.

On Petition For Writ of Ceriorari To The United States Court of Appeals For The Second Circuit

RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Argument:

THE BANKRUPTCY COURT'S APPROVAL OF THE TRUSTEE'S SETTLEMENT OF THE STATE COURT ACTION AND THE SUBSEQUENT AFFIRMANCES THEREOF WERE NOT AN ABUSE OF DISCRETION AND, IN ANY EVENT, DO NOT CONCERN IMPORTANT FEDERAL QUESTIONS SUFFICIENT TO WARRANT A REVIEW BY THE SUPREME COURT ON A WRIT OF CERTIORARI 11

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Question Presented

Whether the Second Circuit Court of Appeals erred in affirming the determination of the United States District Court for the Southern District of New York that the United States Bankruptcy Court for the Southern District of New York had not abused its discretion by granting Respondent's motion as Chapter 7 Trustee, pursuant to 11 U.S.C. §9019, and approving Respondent's $1.2 million settlement of the Appellants-Debtors' state court for legal malpractice and fraud.

Preliminary Statement

Respondent, Kenneth P. Silverman, Esq., the Chapter 7 Trustee (the "Trustee") of the bankruptcy estate of petitioners George C.S. Liu and Gail K. Liu (the "Debtors"), by his attorneys, Jaspan Schlesinger Silverman & Hoffman, LLP, respectfully submits this brief in Opposition to the Debtors' petition for a writ of certiorari on the grounds that the determinations for which the Debtors now seek review do not concern the resolution of conflicting decisions involving an important federal matter or a departure form the accepted and usual course of judicial proceedings, as specified in Supreme Court Rule 10, but rather involve the sound exercise of judicial discretion arising out of the approval of a $1.2 million settlement of the Debtors' legal malpractice action by the United States Bankruptcy Court for the Southern District of New York.

Statement of Facts

On March 3, 1994 (the "Filing Date"), the Debtors filed a voluntary petition for relief in accordance with chapter 11 of Title 11 of the United States Code which was subsequently converted to a chapter 7 liquidation proceeding. By Notice of Appointment dated June 20, 1996, Kenneth P. Silverman, Esq. was appointed and duly qualified as the chapter 7 Trustee of the Debtors' estate.

In March 1992, prior to the filing of their voluntary bankruptcy petition, the Debtors commenced an action in the Supreme Court of New York, County of New York entitled "*George C.S. Liu and Gail Kim Liu v. Joseph T. Macari, Louis*

J. Macari, Frank G. Messina, Neil Weissman, Macari, Messina & Ingber, a partnership, and Gould and Weissman, a partnership" (the "State Court Action"). At that time, the Debtors were represented by Elliot Rudick, Esq.

During their chapter 11 proceeding, the Debtors continued with the proceeding, the Debtors continued with the prosecution of State Court Action through Mr. Rudick. Thereafter, upon his appointment, the Trustee continued with the prosecution of the State Court Action, which had part of the Debtors' bankruptcy estate, again through Mr. Rudick, for the benefit of the Debtors' bankruptcy estate and their creditors.

The State Court Action arose out of the Debtors's purchase of certain real property consisting of a ninety-one unit co-operative apartment building located in Queens, New York, known as Blair House, from defendant Joseph T. Macari. The facts alleged by the Debtors are as follows:

In or about April 1986, the Debtors located certain real property in Elmhurst, New York that they were interested in purchasing for investment purposes. When they communicated that interest to their attorney, defendant Louis Macari, Esq., he and his partner, defendant Frank Messina, Esq., declined to represent the Debtors and referred them to Neil Weissman, Esq. who, upon meeting the Debtors, advised them that he had learned that the Elmhurst property had been sold. Neil Weissman recommended that the Debtors look at Blair House. At that time, the Debtors believed that Blair House had already been converted to co-operative ownership.

On or about June 5, 1986, the Debtors contacted with Joseph T. Macari for the purchase of Blair House for $4.75 million. At that time, the Debtors did not undertake any financial analysis of the propriety of the Blair House transaction, did not retain any engineer to inspect the building and did not know that a tenants group had been formed to

oppose the co-operative conversion. In July 1986, the Debtors became aware that Blair House had *not* been previously converted to co-operative ownership.

The Blair House transaction closed in November 1986. At the closing, the Debtors were represented by Neil Weissman. Joseph T. Macari was represented by Louis J. Macari. Contemporaneously with the closing on Blair House, the Debtors retained Louis J. Macari and Frank Messian to represent them in connection with its conversion to a co-operative apartment building. The total mortgages on Blair House, as a result of the Debtors' purchase thereof, consisted of (a) a $1.5 million loan from State Savings Bank, (b) a $300,000 loan on the Debtors' apartment and (c) $2.15 million in purchase money mortgages owed to Joseph T. Macari.

The Debtors operated Blair House for several years but were unable to do so profitably, and ultimately mortgaged their other unencumbered property in order to pay the debt service and the other expenses associated with Blair House. Eventually, Joseph T. Macari foreclosed on his mortgages and purchased Blair House at the foreclosure sale.

The complaint in the State Court Action asserted causes of action against Joseph T. Macari based upon fraud and misrepresentation in connection with the sale to the Debtors. The Debtors also asserted causes of action against their attorneys, Louis J. Macari, Frank Messina and Neil Weissman, based upon misrepresentation, negligence, malpractice and breach of fiduciary duty in connection with their representation of the Debtors in various aspects of the Blair House transaction. The Debtors sought damages in excess of $6 million.[1]

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1. Inexplicably, the Debtors now claim to have suffered damages in excess of $31 million.

The Settlement of the State Court Action

During the pendency of the State Court Action on the trial calendar, the Trustee and defendants engaged in mediation which resulted in the settlement of the State Court Action. The terms of that settlement required Risk Enterprise Management Limited, as the representative of the insurers of the defendant attorney, to pay to the Trustee the sum of $1,175,000 and for defendant Joseph T. Macari to pay to the Trustee the sum of $25,000 and to waive his $1.8 million claim against the Debtors' estate. The $1.2 million paid to the Debtors' estate under the written stipulation of settlement (the "Stipulation") represents approximately seventy-five (75%) percent of the total available coverage under the malpractice insurance maintained by the defendant attorneys and a significant portion of the only asset that would be available to satisfy a judgment rendered against the defendants in the State Court Action in the unlikely event that the Debtors prevailed at trail and upon any subsequent appeal.[2]

The Trustee's Motion For Bankruptcy Court Approval Of The Stipulation

Thereafter, the Trustee moved for approval of the Stipulation by the Bankruptcy Court pursuant to 11 U.S.C.

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2. During the mediation, the Trustee learned that, although defendants Louis Macari and Neil Weissman originally maintained malpractice insurance in an aggregate sum of $2 Million, a previous claim against Neil Weissman reduced his coverage to $675,000 thereby reducing the total insurance available to pay the Debtors' claims to $1,675,000.

§9019 (the "Motion")[3]. The Debtors filed objections to the approval of the Motion.

The first hearing in connection with the Trustee's Motion was conducted by Chief Bankruptcy Judge Brozman on July 31, 1997. At that time, Chief Bankruptcy Judge Brozman entertained extensive oral argument by the Trustee, his counsel, the Debtors' two bankruptcy counsel and by the Debtors. As a result of the oral argument, the Bankruptcy Court requested that the Trustee provide certain additional information regarding his settlement of the State Court Action and continued the hearing on the Motion to August 19, 1997.

By letter dated August 18, 1997, the Trustee provided the requested information to the Bankruptcy Court. Thereafter, at the August 19, 1997 hearing, the Court, after a review of the Trustee's additional documentation and a lengthy discussion with Mr. Rudick, approved the Stipulation. Chief Bankruptcy Judge Brozman found:

> THE COURT: All right. I think the record will reflect after two hearings that I have given this very careful consideration, and that I have fulfilled my responsibility of canvassing the issues to determine whether the settlement is properly approved.
>
> After having engaged in that exercise, I can only conclude that this settlement is a proper and appropriate one for a number of reasons.
>
> I am particularly persuaded by some of the

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3. 11 U.S.C. §9019 provides as follows: "On motion by the Trustee and after notice and a hearing, the Court may approve a compromise or settlement."

comments made by Mr. Rudick, who is quite naturally sympathetic to the Lius, having represented them prior to his representation of the Trustee, and he has candidly admitted to me a number of things which go to influence my decision.

Number one is he has admitted to me that the case against Mr. Macari is, as the Trustee characterizes it, a thin one, and that there is a much stronger case against Lewis [sic] Macari's law firm than there is against Joseph Marari.

The Trustee has just explained quite ably why it makes sense to settle with Joseph Macari and not sever, and that is, to reduce the claims significantly that are asserted against the fund which would come into the estate.

To sever and proceed against Joseph Macari would really be rolling the dice twice, because the result could be that the claims against the estate stand, and in addition, there is no recovery as against Joseph Macari, and so there is kind of what I call a double whammy against the creditors of the estate, which I don't think would be appropriate, in light of special counsel's view of the strength of the case against Mr. Macari.

There is also a *bona fide* issue with respect to the statute of limitations.

Although counsel are agreed, and I had indicated my preliminary agreement as well as at the time of the previous hearing, that the amendment to the statute of limitations is prospective only and not retroactive, there nonetheless is an iffiness to whether or not there could be a recovery as against Neil Weissman and Lewis [sic] Macari.

And the reason for that is because if it were to be shown that Neil Weissman and Macari are negligent, there is still a question whether or not negligence legally would be sufficient to translate into a breach of contract claim, such that the benefit of the six year statute of limitations could be obtained.

There is, Mr. Rudick candidly admitted to me, there is no case on point, and that those cases which have dealt with the issue in any way have been factually distinguishable.

- So I think although it may be that Mr. Rudick has the better of the arguments on this, there is far from any certainty, and there is– it injects a further element of risk into these proceedings.

There is also an issue, legal issue respecting whether or not Mr. Neil Weissman, assuming that he did not render any financial or other nonlegal advice to the Lius, would have been under an obligation to do so.

There probably would be some expert testimony were the case to go to trial as to what the expert believes that another attorney would do under the circumstances, however, I question whether that testimony is sufficient to establish a legal obligation. It may be establishing what is often the practice, but that is different than a legal obligation, so I have a question there as well.

There is very substantial issue concerning the calculation and recovery of damages.

Although the Lius contend they have lost between $7 million and $10 million in damages as a result of the Defendants' actions, I think that there is a legitimate issue respecting whether or not their recovery could be at anything approximating that number. That is for two reasons. The first is because subsequent to the closing of the transaction, which they contend they were defrauded into entering, they encumbered property which was previously not encumbered in order to try to support the ongoing operations of the co-op.

If they are limited to a breach of contract theory, as the law would seem to suggest, then those damages which arose by virtue of their encumbering and subsequently losing some of their property, might not be foreseeable, and not properly recompensed as consequential damages.

> In addition, it could be argued that the Lius failed to avail themselves of bankruptcy protection at an appropriate point in time, waiting too long before they took action to mitigate their damages. So there too we have a very substantial issue.
>
> Finally, special counsel has admitted to me there may be some problem in relying on the testimony of certain people whom he would naturally have to call as a witness, and I am deliberately not revealing that on the record, in case, by some stretch, although I have approved the settlement, this were to be reversed on appeal, I don't want to prejudice anyone's case.
>
> But as the *in camera* examination demonstrated, Mr. Rudick is not entirely confident that he can rely on all of the people one might hope to be able to rely on in a trial of this matter.
>
> For all of those reasons which I have just elucidated, it seems to me that the $1.2 million which is the settlement amount under the $1.6 million insurance coverage, is the appropriate way to go here. These are much stronger claims than any of the other claims, and there is in addition the correlative benefit of the withdrawal of substantial claims against the estate.

(Respondent's Appendix). The Bankruptcy Court's September 3, 1997 order approving the Stipulation was entered on

September 4, 1997.

The District Court Decision

By order dated April 9, 1998, United States District Judge Sidney H. Stein affirmed Chief Bankruptcy Judge Bronzman's order approving the Stipulation holding that Chief Bankruptcy Judge Brozman had not abused her discretion and that she had appropriately canvassed the issues and determined that the settlement did not fall below the lowest point in the range of reasonableness.

The Second Circuit's Decision

By Summary Order dated December 21, 1998, the Second Circuit Court of Appeals affirmed District Judge Stein's April 9, 1998 order finding that "the $1.2 million settlement approved by the bankruptcy judge is manifestly within the range of reasonableness" and that "[i]n light of the risks inherent in pursuing the underlying claims, the bankruptcy court's decision was well within its discretion." The Debtors' motion for rehearing as denied by the Second Circuit.

ARGUMENT

THE BANKRUPTCY COURT'S APPROVAL OF THE TRUSTEE'S SETTLEMENT OF THE STATE COURT ACTION AND THE SUBSEQUENT AFFIRMANCES THEREOF WERE NOT AN ABUSE OF DISCRETION AND, IN ANY EVENT, DO NOT CONCERN IMPORTANT FEDERAL QUESTIONS SUFFICIENT TO WARRANT A REVIEW BY THE SUPREME COURT ON A WRIT OF CERTIORARI.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Supreme Court Rule 10. A petition for a writ of certiorari will be granted only for compelling reasons and will rarely be granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. See *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed 837 (1963); *Rice v. Sioux City Memorial Parks Cemetery, Iowa,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed 897 (1955)

In this case, the Summary Order does *not* conflict with the decision of any other United States Court of Appeals, does *not* decide an important federal question in a way that conflicts with a decision by a state court of last resort and does *not* so far depart from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power. Supreme Court Rule 10. Rather, the Summary Order affirmed the Bankruptcy Court's proper application of well settled law regarding the standard of review for settlements under 11 U.S.C. §9019.[4]

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4. The approval of a settlement rests with the sound discretion of the Bankruptcy Court which must determine whether the proposed compromise is in the "best interests of the estate". *In re Arrow Air, Inc.,* 85 B.R. 886, 891 (Bankr. S.D. Fla. 1988); *Depo v. Chase Lincoln First Bank, N.A.(In re Depo),* 77 B.R. 381, 383 (N.D.N.Y 1987), *aff'd* , 863 F.2d 45 (2d Cir. 1988). The Bankruptcy Court is required to make an informed and independant judgment concerning whether the settlement is fair and equitable based upon an educated estimate of the complexity, expense and likely duration of any litigation, the possible difficulties of collecting on any judgment, all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise and whether the settlement favorably compares with the likely rewards of litigation. *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424-425, *reh'g denied,* 391 U.S. 909 (1968). *See American Can Co. v. Herpel (In re Jackson Brewing Co.),* 624 F.2d 605, 607 (5th Cir. 1980). The Bankruptcy Court must "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *Cosoff*

Indeed, regardless of the Debtors' baseless assertion that their appeal would concern Fifth Amendment due process and Federal Rule of Civil Procedure 60(b) issues, the *exclusive* issue to be determined by this Court would be whether, based upon the factual predicate of the State Court Action, the Bankruptcy Court, as affirmed by the District Court and by the Second Circuit, abused its considerable discretion by approving the $1.2 million settlement of the State Court Action, recommended by the Trustee and his counsel. Resolution of that issue does not involve serious Constitutional concerns nor important federal questions. Rather, it would simply require this Court to substitute its opinion regarding the complexity, expense and likely duration of any litigation, the possible difficulties of collecting upon any judgment, and all of the other factors relevant to a full and fair assessment of the Stipulation for that of Chief Bankruptcy Judge Brozman, the District Court and the Second Circuit. In sum, the Debtors do not seek to remedy a misapplication of the governing legal principles applied by the Bankruptcy Court or the appellate courts. Instead, they seek now to obtain from this Court a different factual conclusion based upon the application of the identical legal principles. Under those circumstances, the Debtors' petition for a writ of certiorari should be denied .

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v. Rodman (In re W.T. Grant Co.), 699 F.2d 599, 608 (2d Cir.), *cert denied*, 464 U.S. 822 (1983); *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), *cert denied*, 409 U.S. 1039 (1972); *Chopin Assoc. v. Smith (In re Holywell Corp.)*, 93 B.R. 291, 294 (Bankr.S.D.Fla. 1988); *In re Teltronics Services, Inc.*, 762 F.2d. 185, 189 (2d Cir. 1985).

Conclusion

Based upon all of the foregoing, the Debtors' petition for a writ of certiorari should be denied in its entirety.

Dated: Garden City, New York
May _____, 1999

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Shalini Vohra

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of

GEORGE LIU,
Debtor.

Case No.
94 B 40970

August 19, 1997

United States Custom House
One Bowling Green
New York, New York 10004

Hrg. re: Settlement.
SEALED
(Pages 8 through 22)

BEFORE:

HON. TINA L. BROZMAN,
Bankruptcy Judge.

GEORGE LIU

APPEARANCES:

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Attorneys for Trustee
300 Garden City Plaza
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BY: KENNETH P. SILVERMAN, ESQ., of Counsel

-and-

BY: ANTHONY C. ACAMPORA, ESQ., of Counsel

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-AND-

LAWRENCE H. FINE, ESQ.
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GEORGE LIU

APPEARANCES (CONTINUED):

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BY: M. DAVID GRAUBARD, ESQ., of Counsel

GEORGE LIU

PROCEEDINGS

THE COURT: Let me just start out by remarking that moments before I took the bench, I was handed a letter to be reviewed in camera from the Trustee's counsel, and I did not have an opportunity to review it, because it was right before I took the bench.

So I think perhaps it makes sense for me to take a brief recess and read through that before we proceed further.

MR. SILVERMAN: If I may, Kenneth Silverman as Trustee.

So Your Honor has a complete record, I want to be clear that Your honor has received everything I have received, in deference to the Lius and this particular proceeding.

THE COURT: I have received between the last hearing and today a letter from George Liu himself.

MR. SILVERMAN: With exhibits.

THE COURT: With exhibits.

MR. SILVERMAN: I was handed something today, and I believe, Your Honor, an attempt was made to hand you something during the last hearing.

THE COURT: Right, which is, as far as I am concerned, far too late, and objections were to have been filed in the past, so I'm not accepting it.

MR. SILVERMAN: That's fine. I just wanted to make the record complete as to facts and circumstances as Trustee I am aware of.

THE COURT: Okay. There are no other papers that I'm aware of.

MR. BROWN: Betram Brown for the Debtors.

GEORGE LIU

You have not received, Judge an August 14th letter addressed to you. It was handed out to everybody in the courtroom.

MR. SILVERMAN:It's August 18th, Mr. Brown. She has received the 14th.

THE COURT: I received a letter from Mr. Liu with documents attached to it.

MR.BROWN: That was August 10th.

THE COURT: I'm sorry, I don't know the date, but frankly it was completely inappropriate. He's not permitted to make ex parte communication with me, and he was, as I understand it, attempting to do that.

But – I'm sorry, that's a different letter. This is new. I guess this is what somebody tried to hand to me, the letter of August 14th, which I have not seen.

There was a different letter of August 10th, with exhibits, which I have seen.

Both of these letters were inappropriately submitted, because objections to the application were due, Mr. Liu is represented not by one, but two sets of counsel, both of whom I've heard from, so it's not appropriate that he's sending letters to the Court, and I'm not entertaining either of them, because he's ably represented.

Now I'll take the break I allowed to when I first began.

(Whereupon, at this point in the proceedings there was a recess, after which the proceedings continued as follows :)

THE COURT: I have now had an opportunity to read through the submission which the Trustee requested I

review in camera, and it leaves me with a number of questions, as a result of which I'm going to ask the Trustee, special counsel, and the court reporter to come into my chambers for an in camera hearing, so that I can explore some of the issues that are set forth in the letter before I render any type of decision.

Would you come inside, please, and I will, by the way, seal the transcript of this portion of the hearing.

(Pages 8 through 22 of the hearing was held in camera and the transcript is sealed.)

GEORGE LIU - SEALED

THE COURT: The first question I want to ask is a question of the Trustee's counsel.

Page 3 of the letter, in the second full paragraph, there is an indication there that special counsel is on board with this settlement.

Is that a typographical error, or is that correct?

MR. ACAMOPORA: Page 3?

THE COURT: Page 3, the second full paragraph in the fourth, third to fourth lines.

MR. SILVERMAN: Yes.

MR. ACAMOPORA: Yes, that is correct.

THE COURT: Correct that its an error?

MR. ACAMOPORA: No, correct that special counsel is on board, with the understanding that – with the strategy that proceed against Joseph Macari is a dangerous and would not be a fruitful manner in which to proceed with this case.

THE COURT: Mr. Rudick, will you confirm that for me.

MR. RUDICK: I haven't seen the letter.

THE COURT: I'll read this paragraph to you. There are parts of it I don't think I should reveal, but I will ask you question about it where I think it's appropriates.

"Thus, although Joseph T. Macari theoretically represents a potential source of recovery, the case against him of is such dubious merit, and the consequence of elements of such case are so dire that the Trustee, his counsel, and his special counsel believe that abandoning those claims in favor of the settlement set forth in the 9019 motion are justified

under the circumstances, and constitute a prudent exercise of the Trustee's business judgment."

MR. RUDICK: I would be on board, I would be on board to that . I would accept that premise, Your Honor.

THE COURT: All right. It is my understanding–

MR. RUDICK: Is this addressed to me again?

THE COURT: Yes, most of the questions will be addressed to you.

It is my understanding through the Trustee's general counsel that the thrust of the expert testimony underlying the Lius' case is that Neil Weissman and Lewis Macari were negligent in performance of their services for the Lius.

MR. RUDICK: That is correct.

THE COURT: If that is correct, then please explain to me what evidence you would introduce, what type of evidence you would introduce on negligence, when, as I understand it, based on pre-amendment case law and the statute of limitations, the negligence claims might be barred, which contract might not be, but negligence might be.

MR. RUDICK: I'm sorry?

THE COURT: Maybe I'm not explaining myself well.

Trustee has laid out, we touched on this at an earlier hearing, but has laid out some of the law with respect to the statute of limitations, and we all of us agreed that in all likelihood, the amendment to the statute was not retroactive, but prospective.

But the Trustee has further informed me that the Santulli case and its progeny have extended applicable statutes of limitations on legal malpractice to six years, but in so doing, have also limited the theory of recovery of breach of contract, that negligence is not unavailable theory if you're proceeding three years after the alleged malpractice occurred.

MR. RUDICK: Correct.

THE COURT: If that is correct, how can you expect to recover as against Neil Weissman and Lewis Marcari if the expert has given his opinion that their actions were negligent?

MR. RUDICK: Because the pleadings are couched in breach of fiduciary duty. In other words, there is a contract theory here, and to the extent that the –

THE COURT: Would your expert's testimony support your theory?

MR. RUDICK: The expert's testimony would definitely be in the area of negligence/malpractice. We're not talking about any intentional wrongs.

What I would have to do then is seek a ruling from the Court in the form of a, at the end of the case, a statement to the jury to the effect that you can make a finding, if you find that the lawyers were negligent, you can find that they breached their fiduciary obligation to the client, and therefore, okay, the six year statute of limitations would be applicable

THE COURT: Is there any case law which supports the proposition that you've just put forth?

MR. RUDICK: My understanding is under the progeny of these cases that the Santulli case, and Sears

Roebuck is another case, and there were some others, that basically the Courts have said that you can, and there are even cases that say you can where you haven't even pleaded contract in your Complaint, although I think I did, where the Court will imply a contract theory.

And on that basis, we can take a malpractice case, which under the old law would probably just be a negligence case, and can make it into a contract case

THE COURT: Is this a magic transformation, or are there additional elements you would have to prove over and above common law negligence in order to sustain a contract case?

MR. RUDICK: In think I would have to prove there was a contract relationship between is the parties.

There was an attorney-client relationship between the parties, and if in fact the negligence arose as a result of that attorney-client relationship, that the Court would apply the six year statute.

THE COURT: Now let me ask that question once again. Has that occurred in any of these cases that you've cited, that the Trustee cited?

MR. RUDICK: You mean Santulli and Sears Roebuck? None were exactly on point. This case is somewhat unique in that regard.

THE COURT: That's what I was trying to get to, whether what you're proposing is a, call it a novel application on the existing law? Or not necessarily, that there is an iffiness to it.

MR. RUDICK: If you read the cases, Judge, one would get the impression that what the Court of Appeals was

doing was liberalizing the rule to benefit as many people as it could.

And to that extent it seemed to me that the Court was in essence saying we'll take something which is, might be negligence in stance, because malpractice is negligence in stance, and what we'll do is we will apply a contractual application to it.

So that I just got the impression that a case similar to the one here, that if in fact, the Court of Appeals were called upon to rule on that question, that they would find that since the negligence arises out of the contractual relationship, we'll apply the six year statute.

Do I have a case that specifically says that? No.

THE COURT: Yes?

MR. ACAMOPORA: Just to clarify one point for you Your Honor.

The Santulli cases and Sears Roebuck cases concern themselves with the application of the statute of limitations. They really didn't concern themselves with what you would have to do at trial to get there.

The Court of Appeals said I will give you the six year statute, but what happens after that –

THE COURT: I understand that.

THE RUDICK: There would be another problem in terms of proving damages, and went on to say therefore, we would be limited in terms of the kinds of damages that we could prove.

We would have to be able to prove that the parties could have foreseen – the attorney, the attorney could

have foreseen the resultant outcome of whatever they did wrong here.

THE COURT: As I understand it, and let me make sure I understand it correctly, there was an iffiness about some of the damage claimed as well, because the Lius decided after this transaction to encumber previously unencumbered property, and also did not file bankruptcy when probably they should have.

MR. RUDICK: I have stated to counsel, I've stated to Mr. Silverman, I've also stated to Anthony Acampora, that although I had approximately $6.5 million worth of damages, I thought that $3.5 million worth of damages were realistically provable.

I thought that some of the others would be – once again, Judge, you're looking at a question of is it foreseeable they would go out and borrow monies on all of these other properties and do what they did. I think that would be stretching it.

The main thrust of my case were the damages that arose out of the transaction itself, and the transaction itself, the actual transaction, the monies borrowed, the monies loaned the interest paid back, et cetera, we're talking there about three and a half million dollars.

THE COURT: Which the Trustee proposes to settle under the malpractice insurance policies, refresh my recollection, for?

MR. SILVERMAN: $1.2 million out of the $1.6 million.

THE COURT: Available on the policies?

MR. SILVERMAN: Left available on the

policies.

THE COURT: Okay. Please tell me what your impression is, since a lot will rest on the credibility of the case, if the case is ultimately tried, your impression about the Lius' presentation as witnesses?

MR. RUDICK: Questionable They – during the depositions Mr. Liu did not make a good witness. Mrs Liu made a better witness. It conceivably could have been a problem at trial.

I'm not saying that – sometimes you have a very good witness and you know you have a good witness.

These people are very, very emotionally involved in this, Your Honor, and many, many times I couldn't get them to focus, and I don't know at a trial what a good cross-examination might have done with that.

I was prepared to – we never – we came close to it, but never came to the point I was prepared to – I wasn't going to put Mr. Liu on the stand at all. I was just going to use her, because she seemed to be a better witness.

I would not have put him on the stand. He gets very excited, very agitated, and where he was confronted with a difficult question, he would say, "I'm not saying anything, I'm not telling anything, I'm not talking."

It wasn't – there is no doubt about it. It would have been a problem with the case. We'd have to work on that.

THE COURT: Okay. Is there any legal authority under which Weissman would have been required to render financial or other type of advice to the Lius, in other words, to tell them to be circumspect and that they should retain other people?

MR. RUDICK: Weissman contends that he gave them this advice. Weissman also, I don't know whether it's in–

THE COURT: The Lius dispute it as I understand it.

MR. RUDICK: Absolutely. What made Weissman a little more vulnerable was the fact, I don't know whether it as reported to you, but, it may not have come up, that Weissman apparently lost his file in a fire which had never been documented in any way.

THE COURT: The fire had never been documented?

MR. RUDICK: There was a fire, and apparently through the water damage, they threw all the files out, so now he doesn't have a file.

THE COURT: We'll presume for purposes of discussion that the Lius' version of the facts is correct and that this advice was not given to them.

Is there legal authority which would suggest that Weissman was under an obligation to give them this advice which he didn't give them?

MR. RUDICK: I was going to rely on my expert. I had an expert in the area of cooperative and conversation law, similar to this kind of situation, co-op conversations.

THE COURT: Your expert's an attorney?

MR. RUDICK: An attorney. He was eminently qualified. Steve Raphael was his name. He was named in one of the periodicals as one of the ten best lawyers in New York, so the credentials were there.

I was going to rely on his opinion that any attorney in that area, in the field of cooperative conversation, would have advised the clients concerning the financial consequences of the transaction, and had to, because the financial --

THE COURT: Which is not really the standard. It would seem --

MR. RUDICK: Should have.

THE COURT: Should have, and the expert was prepared to so testify?

Now, of course, he indicates that he told this to them, okay, he told them to seek out -- so that we have here now a question of --

THE COURT: Factual dispute, I understand.

MR. RUDICK: Exactly. There is no documentation which I can point to which makes Neil Weissman vulnerable.

The only thing I have here is the testimony of the Lius and the circumstances of the case, what circumstances, you don't go into a deal like this under -- at the amount of money they paid.

What they probably could have received back if the thing had been-- he was looking at it as if it had been totally successful, that the rate of return would have been small, and it would have been small enough they should never have gone into this deal.

There is no doubt that the much stronger case, Judge, the much stronger case was against the other law firm.

THE COURT: Okay. Macari's, right?

MR. RUDICK: Yes.

THE COURT: Just one other factual question on that subject of Weissman. Does Weissman contend that he gave information to both of the Lius, or to one of the Lius?

MR. RUDICK: Both of the Lius. There were a number of various meetings that they had.

THE COURT: Both he and she attended?

MR. RUDICK: Yes.

THE COURT: The Trustee has informed me, you will recall that I had asked him to go check on the possibility of executing on a judgment over and above the insurance policies.

GEORGE LIU - SEALED

The Trustee has informed me that he, based on the information which he was able to obtain, it would appear that the individuals are judgment proof, and I just want to know whether you have any information to contradict that.

MR. RUDICK: I have nothing to contradict that. I was relying on what they said.

THE COURT: All right. I believe those were all of the questions which I had after reading this letter. Let me just check through it one more time.

THE COURT: I think we can go back into the courtroom. Thank you for coming in here. This portion of the transcript is to be sealed.

(End of sealed portion.)

GEORGE LIU - SEALED

THE COURT: Mr. Acampora.

MR. ACAMPORA: Yes, ma'am.

THE COURT: Is there anything that you want to state since or last hearing other than what's set forth in this letter which you sent to me?

MR. ACAMPORA: No, Your Honor.

THE COURT: Well, I think it's important, I think there is one thing that's important, and that is what you have discovered respecting the availability of alternate sources of recovery.

MR. ACAMPORA: Fine, Your Honor, I'll address that point.

When I left here after our last hearing, I immediately contacted counsel for the carriers and asked them two very important questions.

The first question was we would like some more money to settle this transaction, settle this deal, and I was met with a resounding no.

And the second question I asked them for was for financial statements for all the Defendants, so we could evaluate their financial condition, and I was always met with a resounding no.

We then proceeded to use the computer Internet sources that are available to us.

We have a program resident in our office called -- through Database Technologies, and what it is a program that searches public records and enables you to discover holdings on real property, who owns planes, boats, and other kinds of salient public information.

We did those searches for Macari, for Lewis

Macari, Neil Weissman, Frank Mesina, and Joseph Macari, and as set forth in our letter, Judge, we didn't come up with anything owned by Neil Weissman.

Mr. Mesina had minimal holdings. Mr. Macari had --

THE COURT: Which Mr. Macari?

MR. ACAMPORA: Lewis Macari had apparently transferred his home to his wife in what would be the fraudulent conveyance six-year statutory period, but the value of the home seemed to be minimal.

That represents just another lawsuit that would not really inure to the benefit of the estate.

Joseph Macari, to my surprise, owned quite a bit of real estate in his own name, and what we sent out in the letter is that the possibility of recovery against him is minimal.

Based on that, Your Honor, that is the search we've done.

There is not a tremendous amount of information on the Internet or otherwise that allows you to get into the individuals' finances.

As Your Honor knows, Dun & Bradstreet deals mostly with corporations, and that information is only as good as the corporation that is providing it.

So, our investigation has not turned up any other free assets upon which we could execute over and above the insurance coverage.

THE COURT: All right. Is there anything that any other counsel want to add?

That was what I sent to the Trustee off to do.

MR. BROWN: Judge, this is Bert Brown. I'm

beginning -- I need to inquire and take this in one direction only.

have a feeling that the two lawyers are in one place, the Joseph Macari -- the claim against Joseph Macari, I wonder whether or not if we were to settle the case against the two lawyers, against Lewis and against Weissman, whether or not there is any ability for us to proceed further against Joseph.

In other words, we have a theory, and whether or not it's plausible, the man has assets, there is something that can be done.

That's my only question, Judge.

THE COURT: All right. I don't think it's an unreasonable question. I'd ask Mr. Rudick to address himself to it.

He's given me some information, but I think he should do it in a more public way.

MR. RUDICK: I think a motion, Your Honor, I think that a motion can be made to sever the Joseph Macari case.

That's providing, of course, that the other Defendants do not object in any way. Such a motion can be made.

At this stage in the proceeding, on the event of a trial, I frankly don't know how a Judge in Supreme Court would rule on that.

Maybe -- I have trial counsel here as well. Maybe he can be of some assistance in that regard, as to whether or not the case could be severed against one of the Defendants.

MR. WASHOR: My name is Barry Washor.

I presume the settlements with the individually named Defendants, I'm not aware of whether they have been

linked in any manner or form.

That would be a determination that would have to be made by the Defendants.

THE COURT: His question, since you're looking perplexed, is whether the settlement would resolve the dispute against all the Defendants, including non- settling Defendants.

MR. ACAMPORA: There are no non-settling Defendants.

THE COURT: That's the question he had.

MR. . WASHOR: That's what's being proposed, I think, by Mr. Brown.

MR. SILVERMAN: May I have a minute, Your Honor?

THE COURT: Certainly.

MR. SILVERMAN: Your Honor, perhaps I'd like to address this without breaching the confidential nature of the document that's been sealed.

Intellectually, theoretically, the question asked by Mr. Brown is a fair one, and the answer would be yes, in a normal set of circumstances you could sever.

The insurance companies have no interest or desire to have to deal with the Joseph Macari claim.

But, what has been forgotten for the moment is that, and part of the settlement is a very, very substantial claim in the Debtor's estate of in excess of, I believe, correct me if I'm wrong, a million eight.

MR. GRAUBARD: A million eight?

MR. WOLF: Yes.

MR. SILVERMAN: A million eight is being

compromised as part of this settlement.

THE COURT: That's Mr. Joseph Marcari's claim.

MR. WOLF: And the claim of Blair House Owners Corp., which I also represent.

MR. SILVERMAN: Which is a deficiency after a foreclosure.

And if the case is thin, as we believe, and as special counsel believes, is thin against Joseph Macari, then in effect all we've done is increase the pool of senior distributees any -- to the settlement we've already effected, and thereby probably giving pause to creditors such as Sivan or Mr. Graubard, who sits to my far left, who would not want to see the Trustee sever the action if Mr. Graubard believed, as the Trustee believes, that the settlement with the Neil Weissman and Lewis Macari was substantially better than the claims against Joseph Macari.

So, to repeat, and without going further into why they we think those claims against Neil Weissman and Lewis Macari are better than the Joseph Macari claims, the answer is yes, you could sever, but not in this case, because there are incidental and collateral benefits that arise out of settling this globally.

THE COURT: All right.

MR. SILVERMAN: Which are substantially, economically substantially significant.

THE COURT: Are there any other comments anyone wants to make?

(No response.)

THE COURT: All right. I think the record will reflect after two hearings that I have given this very careful

consideration, and that I have fulfilled my responsibility of canvassing the issues to determine whether the settlement is properly approved.

After having engaged in that exercise, I can only conclude that this settlement is a proper and appropriate one for a number of reasons.

I am particularly persuaded by some of the comments made by Mr. Rudick, who is quite naturally sympathetic to the Lius, having represented them prior to his representation of the Trustee, and he has candidly admitted to me a number of things which go to influence my decision.

Number one is he has admitted to me that the case against Mr. Macari is, as the Trustee characterizes it, a thin one, and that there is a much stronger case against Lewis Macari's law firm than there is against Joseph Macari.

The Trustee has just explained quite ably why it makes sense to settle with Joseph Macari and not sever, and that is, to reduce the claims significantly that are asserted against the fund which would come into the estate.

To sever and proceed against Joseph Macari would really be rolling the dice twice, because the result could be that the claims against the estate stand, and in addition, there is no recovery as against Joseph Macari, and so there is kind of what I call a double whammy against the creditors of the estate, which I don't think would be appropriate, in light of special council's view of the strength of the case against Mr. Macari.

The Trustee has just explained quite ably why it makes sense to settle with Joseph Macari would really be rolling the dice twice, because the result could be that the claims against the estate stand, and in addition, there is no recovery as against Joseph Macari, and so there is kind of what I call a

double whammy against the creditors of the estate, which I don't think would be appropriate, in light of special counsel's view of the strength of the case against Mr. Macari.

There is also a bona fide issue with respect to the statute of limitations.

Although counsel are agreed, and I had indicated my preliminary agreement as well at the previous hearing, that the amendment to the statute of limitations is prospective only and not retroactive, there nonetheless is an iffiness to whether or not there could be a recovery as against Neil Weissman and Macari are negligent legally would be sufficient to translate into a breach of contract claim, such that the benefit of the six year statute of limitations could be obtained.

There is, Mr. Rudick candidly admitted to me, there is no case on point, and that those cases which have dealt with the issue in any way have been factually distinguishable.

So I think that although it may be that Mr. Rudick has the better of the arguments on this, there is far from any certainty, and there is -- it injects a further element of risk into these proceedings.

There is also an issue, legal issue respecting whether or not Mr. Weissman, assuming that he did not render any financial or other nonlegal advice to the Lius, would have been under an obligation to do so.

There probably would be some expert testimony were the case to go to trial as to what the expert believes that another attorney would do under the circumstances, however, I question whether that testimony is sufficient to establish a legal obligation.

It may be establishing what is often the practice, but that is different than a legal obligation, so I have a question

there as well.

There is a very substantial issue concerning the calculation and recovery of damages.

Although the Lius contend they have lost between $7 million and $10 million in damages as a result of the defendants' actions, I think that there is a legitimate issue respecting whether or not their recovery could be at anything approximating that number.

That is for two reasons. The first is because subsequent to the closing of the transaction, which they contend there were defrauded into entering, they encumbered property which was previously not encumbered in order to try to support the ongoing operations of the co-op.

If they are limited to a breach of contract theory, as the law would seem to suggest, then those damages which arose by virtue of their encumbering and subsequently losing some of their property, might not be foreseeable, and not property recompensed as consequential damages.

In addition, it would be argued that Lius failed to avail themselves of bankruptcy protection at an appropriate point in time, waiting too long before they took action to mitigate their damages. So there too we have a very substantial issue.

Finally, special counsel has admitted to me that there may be some problem in relying on the testimony of certain people whom he would naturally have to call as a witness, and I am deliberately not revealing that on the record, in case, by some stretch, although I have approved the settlement, this were to be reversed on appeal, I don't want to prejudice anyone's case.

But as the in camera examination

demonstrated. Mr. Rudick is not entirely confident that he can rely on all of the people one might hope to be able to rely on in a trial of this matter.

For all of those reasons which I have just elucidated, it seems to me that the $1.2 million, which is the settlement amount under the $1.6 million insurance coverage, is the appropriate way to go here.

These are much stronger claims that any of the other claims, and there is in addition the correlative benefit of the withdrawal of substantial claims against the estate.

I recognize that they will not likely lose anything, but because of all the reasons I've gone through, and after my careful consideration that notwithstanding on a personal level I have some sympathy to the Lius, I do not believe it would be an appropriate measure on my part to deny settlement of this action.

Have you brought an order?

MR. ACAMPORA: I brought an order.

Under the circumstances, I would prefer to settle an order on Debtor's counsel. I have to mark it up.

THE COURT: You may do so.

MR. ACAMOPORA: Thank you, Your Honor.

THE COURT: Thank you. You may do so.

CERTIFICATE

I, HOPE LYNN MEMAKER, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth, and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage: and that I am in no way interested in the outcome of this matter.

S/_____

Supreme Court, U.S.
FILED
AUG 12 1999
OFFICE OF THE CLERK

(3)

No. 98-1881

IN THE

Supreme Court of the United States

GEORGE C. S. LIU and GAIL K. LIU,

Petitioners,

v.

KENNETH P. SILVERMAN, ESQ., CHAPTER 7 Trustee of the Estate of George C. S. Liu and Gail K. Liu,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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9pp

QUESTION PRESENTED

Was the Second Circuit Court of Appeals wrong in affirming the District Court for the Southern District of New York's determination that the Bankruptcy Court for the Southern District of New York did not err in affirming a $1.2 million settlement of the Debtors' malpractice and fraud actions against three attorneys and a real estate broker in New York State Supreme Court?

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FURTHER REASONS FOR GRANTING THE WRIT

THE COURTS HAVE BEEN MISLED AND, THEREFORE, ITS DECISIONS HAVE NOT BEEN IN THE DEBTOR'S BEST INTEREST.

On August 19, 1997, Chief Bankruptcy Judge Tina L. Brozman, Southern District of New York, approved a settlement in the amount of $1,200,000 for an action commenced by the debtors, before their bankruptcy filing, against three attorneys and a real estate broker (the brother of Louis J. Macari, Esq.). The action was, among other things, for fraud, malpractice, breach of fiduciary duty, forgery, conflict of interest, misrepresentation.

The malpractice carriers settled for the sum of $1,175,000 (payment to the trustee) and the real estate broker, Joseph Macari, agreed to pay $25,000. As a result of this settlement, the creditors would get paid, the trustee and his attorney would get paid, the attorney in the State Supreme Court action would get paid and the debtors would receive nothing.

The respondent's brief misleads this Court as the respondent has misled all of the lower courts. The respondent claims that the debtors sought damages in excess of $6 million in their state court action and, "[i]nexplicably, the Debtors now the claim to have suffered damages in excess of $31 million."

Since the date of the scam and fraud by the attorneys and broker against the debtors, the amount of damages have grown from June 1986 through September 1998. The debtors have had to borrow monies from a bank and received a

purchase money market mortgage from the Seller (the real estate broker) of the property they purchased pursuant to the direction of these attorneys. The debtors have had to mortgage their other properties to stay current on the mortgage obligations of the building they bought.

It was because of the massive fraud inflicted upon the debtors that their debts became so high. They lost five properties they had owned before they were defrauded and lost the property on which they were, under the advice of Elliot M. Rudick, Esq., forced to file bankruptcy. Further, without their agreement, the debtors' Chapter 11 bankruptcy was converted to a Chapter 7 filing. They also lost their home on June 19, 1997 and became homeless. The debtors have requested that this massive fraud be investigated by the Grievance Committee of the District Court.

With the high interest rates they were forced to pay, and the loss of six properties, the debtors lost more than $31,000,000. The net value of the lost properties exceeds twelve million dollars. The Trustee is trying to make the debtors look like liars. They are not. The real cost of their loss is $31 million and growing.

In referring to how the Petitioners arrived at the $31 million damages figure, the Respondent should not deliberately intimidate the Petitioners' rightful statement and hinder this Court's procession. The Respondent should review the Petitioners' (Appellants) Sur-Reply, which was filed in the United States Court of Appeals for the Second Circuit on September 28, 1998, with its attached exhibits, for full details and explanations.

It is hard to comprehend how a trustee with his attorneys could obstruct justice in such grievous magnitude? Yet, they did.

The debtors' attorney in the State action, Elliott A. Rudick, Esq., now the Trustee's special council, had always told the debtors that they had a very strong case. The Trustee, relying on Mr. Rudick's statements, kept Mr. Rudick as its attorney on the state court action. Little did anyone know that Mr. Rudick is not an experienced trial lawyer and that he was not prepared to try the case even though he had submitted a Note of Issue in the state court action stating that he was ready to try the case. The Trustee had lost confidence in Mr. Rudick and was anxious to settle the case for fear that he would not be compensated if Mr. Rudick were to bring the case to trial. Mr. Rudick knew he was not capable of trying their case and wanted an easy, sure way out and to receive a guaranteed pay day.

However, on the date Judge Brozman approved the settlement, the Trustee's attorney in the Bankruptcy proceedings and Mr. Rudick both told Judge Brozman that the debtors had a weak case and that the case should not be brought to trial.

If the case had gone to trial and the debtors lost, no one would have received any money. But the case would not have been lost since the documents that would have been presented at trial would conclusively have proven the guilt of the defendants. If the case was won, everyone would have won, including the debtors. The Trustee and Mr. Rudick did not want to take a chance at trial. If settled, Mr. Rudick would receive $400,000 plus a previously paid $50,000 retainer, the Trustee, his attorney and creditors get paid. Meanwhile,

the mastermind of the scam, Joseph T. Macari, would not be exposed and his net assets of $150 million would remain intact. The debtors get nothing. The debtors were sold out for a sure thing — monies to everyone but the debtors.

That is why the respondent's answer paints the debtors as unreliable and opportunists. That is why respondent misled the Court with money figures that have negative implications on the debtors' veracity.

The truth has been distorted by the Trustee in order that the debtors' writ be denied.

The lower courts listened to the misleading statements of Mr. Rudick and the Trustee's lawyer in order to reach its decisions. Mr Rudick and the Trustee had reason to mislead the courts — if the court did their bidding, they would be guaranteed large sums of money and also protect the mastermind of the scam, real estate broker Joseph T. Macari (the brother of Louis J. Macari, Esq.). If the courts did not agree with their position, they would have to take a chance.

The lower court abused its discretion in that they were blinded by misrepresentations and made a determination which adversely affected the debtors and creditors, not the attorneys and the Trustee for the Estate.

That there was a counterclaim by the real estate broker should not have entered the picture. If the debtors were to win the state court action, then the counterclaim would be unsuccessful and no legal obligation would be incurred by the debtors. As Chief Judge Tina L. Brozman stated during the hearing on August 19, 1997:

> I don't really see how that could be a sustained claim against the Liu's. They didn't have any obligation running to Mr. Macari, so I don't see how he could recover based upon the loss that occasioned as to themselves because he made the decision to foreclose. What's the authority for the recovery of legal fees, since the American rule is each party bears its own?

During the hearing, David Graubard, Esq. stated:

> I want to make two observations. One is with respect to the claims of Joseph T. Macari and Blair House Owners, it seems to me, going over the elements of those claims, that if there is a successful judgment against Mr. Macari in the State Court, those claims go out the window as a matter of course, because they're all wrapped in the same set of facts.

The Court: "Right."

Mr. Graubard:

> The second thing is we had attached recent articles concerning the Statute of Limitations as exhibits to our opposition to the settlement, and I don't think there's any question whatsoever that Statute of Limitations would only be prospective.

Lawrence H. Fine, Esq. Attorney for the Debtor stated during the hearing:

> . . . As Mr. Elliot M. Rudick had said, the Lius have suffered greatly not through their own making. I get emotionally with some clients also

> when I see great injustice. In essence, the attorneys are walking away scot-free what they've done. Nothing is coming out of their pockets. The Lius are going to wind up with nothing. I believe some of this case should go forward. There's no delays. I understand it was just three days before trial when settlement was reached. There is no additional expenses like the trustee had mentioned in his papers. All discovery has been complete. The case will not drag on. . . .

The debtors do not seek a different factual conclusion. After waiting five years and six months for a jury trial, the Lius merely seek their constitutional right to due process. The right to be heard.

On the date of the Settlement conference, neither the debtor nor the debtors' attorneys were permitted to attend the in camera conference held by Judge Brozman. Nobody representing the debtors was allowed to attend the conference even though the debtors and their attorneys were present in the courtroom. The Trustee had stated that other persons were present at the in camera chambers meeting, implying that the debtors were present. But they were not. The trustee is again misleading the Court.

Judge Brozman only heard the people who would benefit from the settlement. The debtors, who had the most to lose were deliberately excluded. Decisions were made without hearing from the debtors or the debtors' attorneys. Again, the debtors' due process rights were denied.

CONCLUSION

Based upon all of the foregoing, the debtors' petition for a writ of certiorari should be granted in its entirety.

Respectfully submitted,

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